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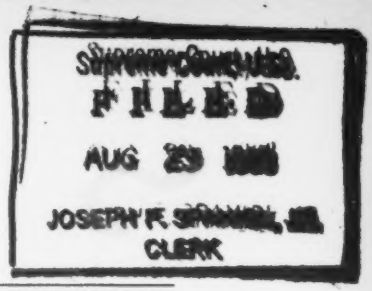

IN THE

Supreme Court of the United States

October Term, 1987

ANTHONY RUGGIANO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Questions Presented for Review

1. What Is the Reach of the RICO Statute When the Theory of Prosecution is Based upon Collection of an "Unlawful Debt" as an Alternative to a Pattern of Racketeering Activity?

2. Can an "Unlawful Debt," That Is, a Debt Incurred in Connection with "The Business of Lending Money" at Usurious Rates of Interest, Be Established by Proof That a Defendant Participated in Only One Extension of Credit?

3. Does Title 18, U.S.C. § 4205(b) Authorize the Increase of a Defendant's Parole Eligibility Date Beyond the Ten-Year Limit Set by § 4205(a)?

4. Should This Court Resolve a Split of Authorities Among the Courts of Appeals Regarding the Construction of Title 18, U.S.C. § 4205?

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No.: _____

IN THE

Supreme Court of the United States

October Term, 1987

ANTHONY RUGGIANO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Anthony Ruggiano petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Opinion Below

The Court of Appeals affirmed petitioner's conviction in an unpublished *per curiam* judgment (Appendix A, *infra*).

Jurisdiction

The judgment of the Court of Appeals was entered on March 17, 1988, and a petition for rehearing was denied on June 30, 1988 (Appendix B, *infra*). The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. § 1254(1).

Statutes Involved

Title 18, U.S.C. § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Title 18, U.S.C. § 1961(6) provides:

> "Unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

Title 18, U.S.C. § 4205(a) provides:

> Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten

> years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

Title 18, U.S.C. § 4205(b) provides:

> Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

Statement

The defendant was convicted of a substantive RICO violation (Count 2) charging him with participating in the affairs of an enterprise through a pattern of racketeering activity by engaging in or aiding and abetting the bribery of William Boone Darden, Sr. and participating in an extortionate credit transaction on December 16, 1981, in violation of 18 U.S.C. § 892 (also charged in Count 20), or alternatively collecting or aiding and abetting the collection of an unlawful debt on any one occasion, in violation of 18 U.S.C. §§ 1962(c) and 1963.

The defendant was also convicted of a conspiracy to violate the RICO substantive charge with the addition of gambling as a third predicate act (Count 1) in violation of 18 U.S.C. §§ 1962(d) and 1963, and of making or aiding

and abetting the making of an extortionate extension of credit (Count 20), in violation of 18 U.S.C. §§ 892(a) and (2) (R115:1685).[1]

On April 8, 1987, the defendant was sentenced to a term of 20 years incarceration on Count 1 and a consecutive term of 20 years incarceration on Count 2. He was sentenced to 20 years incarceration on Count 20 to run concurrently with the sentences imposed on Counts 1 and 2. Pursuant to 18 United States Code § 4205(b)(1), the Court ordered that the defendant would be eligible for parole after serving 13 years in prison (A171; R116:1736-37).

The government's principal witness, Joseph Iannuzzi, testified that at a meeting on March 7, 1981, he was introduced by Thomas Agro to the defendant, who was interested in opening a gambling club. Agro stated that Iannuzzi had been in partnership with Fred Campagnulo a/k/a Fred Campo in a gambling operation. They discussed whether Campo still had contact with William Darden, the Chief of Police of Riviera Beach. The defendant asked Iannuzzi to see if he could arrange for police protection for a gambling club (R104:159-78). Thereafter, it was agreed that Iannuzzi, Agro, and the defendant would be partners in a bottle/gambling club ("Suite 100").

In June, 1981, Iannuzzi introduced John Marino (FBI Agent John Bonino) as his partner, who would help finance and operate the club. Over a period of many months, Iannuzzi and Bonino set about leasing a suitable location, hiring a general contractor to renovate the

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[1] "A" refers to the Record Excerpts filed in the Court of Appeals. "R" refers to the official Record on Appeal. Numbers following the prefix "R" on the left side of the colon refer to the volume number of the Record on Appeal. Numbers to the right of the colon refer to the page numbers of the cited volume. Documents are referred to by the volume number which follows "R" on the left of the colon, document number to the right of the colon, and page number to the right of the document number.

interior, and securing the necessary permits for renovation and operation of a bottle club (R105:241-43, 260-61; R110:903-07, 934-37).

Suite 100 finally opened as a bottle club on February 7, 1982 (R110:1010). While some payments had been made by Iannuzzi to Darden for police protection (R106:421-25; R107:478-85), no gambling involving the defendant ever occurred (R109:832-33).

During the course of construction, the FBI suggested that Iannuzzi request a $25,000 loan to help finance construction (R112:1160-64). Thus, on September 17, 1981, Iannuzzi spoke to the defendant with respect to a $25,000 shylock loan for Bonino to complete construction of the club. The parties agreed that the loan would be repaid from Bonino's fictitious trust fund which purportedly generated $50,000 a year in income (R105:291-310; GX98).

Ultimately, $25,000 was loaned to Bonino at two points per week interest. On December 16, 1981, Ronald Pearlman gave $10,000 to Bonino (R110:962), and on January 4, 1982, Salvatore Reale gave him $15,000 (R110:976-80, 987-91). The defendant's role in this transaction, however, remains unclear. Iannuzzi repeatedly testified that the defendant was the "arbitrator of the loan," meaning the person who arranged for the loan (R106:392; R109:730 and 736). Iannuzzi also testified that he understood the defendant to have stated that the money for the loan came from Pearlman and Reale and that it was their money and not the defendant's. While Iannuzzi testified that he does not know whose money was loaned, he conceded that in Pearlman's and Reale's trial, he testified that the $25,000 loan was not the defendant's money (R109:749-54). Bonino, however, testified that despite Iannuzzi's belief to the contrary, it was his opinion that the money belonged to the defendant (R112:1151-55).

To prove extortion in making the $25,000 loan, the prosecution relied exclusively upon a theory of implied threat. It was conceded by the prosecution that there was no overt or explicit threat in the extension of credit.

Thus, Bonino testified that the loan was made for the purpose of finishing construction of Suite 100; the defendant was working together with Bonino in the anticipated success of that venture; and he always treated Bonino courteously (R111:1083-84). It also was established that neither the defendant nor anyone else ever threatened Bonino in an attempt to collect the loan (R111:1070 and 1083), despite the fact that by the time the investigation was terminated, the loan was substantially in arrears both as to principal and interest (R111:1078-81).

Nevertheless, Iannuzzi testified that at the time the loan was made he understood that if repayment was not made as required, he and Agent Bonino would "suffer the consequences" (R105:347).

The loan was never fully repaid. Eight interest payments were made. The total payment of interest amounted to $13,400 and no principal was repaid. The interest payments were to be made on a monthly basis as specified by Iannuzzi and Bonino. In fact, when repayment of the loan was initially discussed, the defendant told Iannuzzi "set it up any way you want." (GX124).

Reasons for Granting the Petition

This case presents questions of fundamental importance to the administration of criminal justice in the federal courts.

First, what is the reach of the RICO statute when the theory of prosecution is based upon collection of an "unlawful debt" as an alternative to a pattern of racketeering activity? Second, can an "unlawful debt," that is, a debt incurred in connection with "the business of lending money" at usurious rates of interest, be established by proof that a defendant participated in only one extension of credit? And third, whether 18 U.S.C. § 4205(b) authorizes the increase of a defendant's parole eligibility date beyond the ten-year limit set by § 4205(a).

The first two questions involve construction of Title 18, U.S.C. §§ 1962(c) and 1961(6). As an alternative to proving a defendant conducted the affairs of an enterprise through a pattern of racketeering activity in order to establish a RICO violation, § 1962(c) provides for proof of a single collection of an "unlawful debt." An "unlawful debt" is defined by § 1961(6) as "a debt (A) incurred or contracted in [unlawful] gambling activity . . . or which is unenforceable under State or Federal law . . . because of laws related to usury, and (B) which was incurred in connection with the *business of gambling* . . . or the *business of lending money* . . . at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate." (emphasis added).

Interpretation of these statutory provisions is significant to the administration of justice because the RICO statutes have been ever more frequently employed by Federal prosecutors. RICO prosecutions not only account for significant numbers of Federal prosecutions, they also present some of the most complex and time-consuming criminal cases. Further, it is reasonable to anticipate that whenever possible, prosecutors will rely upon the collection of unlawful debt provision as a single collection of an unlawful debt may be more easily proven than a pattern of racketeering activity. Despite the significance of interpreting the proper scope of RICO violations predicated upon allegations of collection of an unlawful debt, there exist scant authority addressing this specific issue.[2] The defendant submits this Court should clearly state that a RICO violation can be predicated upon collection of an unlawful debt only if the debt was incurred in the course of conducting a business involving repetitive extensions of usurious loans.

In restricting the reach of RICO to debts incurred in connection with "the business of lending money," Congress clearly underscored its intent in RICO to punish

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[2] The paucity of authority may be attributable to the fact that in RICO's initial use, prosecutors relied almost exclusively upon the pattern of racketeering provisions.

only the repetitive criminal conduct typical of "organized crime." In *United States v. Salinas*, 564 F.2d 688 (5th Cir. 1977), *cert. denied, sub. nom. Davis v. United States*, 435 U.S. 951, 98 S.Ct. 1577 (1978), the Court of Appeals construed the meaning of the parallel statutory phrase, "the business of gambling, where the law of Texas prohibited 'gambling' but did not explicitly prohibit 'the business of gambling.'" The *Salinas* Court noted carefully that federal law (18 U.S.C. § 1955) defines an "illegal gambling business" as a "substantially continuous operation" involving at least five or more individuals. *United States v. Salinas*, 564 F.2d at 691 and n.8. In explaining the importance of the inclusion of the concept of an illegal "business," the Court said:

> The defendants do not seriously contend that the business of gambling is legal in Texas. If a single act of gambling is illegal, then gambling as a means of livelihood or as an ongoing commercial operation must be illegal as well. The defendants seek to seize upon the state's not classifying gambling as precisely as does the federal statute. But it was not the intent of Congress to attack gambling only in states that classify gambling along the federal model. *The reason for the Congressional conjunctive requirement that a debt be incurred in connection with gambling and with the business of gambling was that it sought to punish only large scale gambling operations involving "organized crime" as contrasted with small time gambling.*
> Pub.L. 91-542, § 1, October 15, 1970.

United States v. Salinas, 564 F.2d at 691 (emphasis added).

The same explanation, of course, applies to Congress' requirement that a debt be both usurious *and* incurred in connection with the business of making usurious loans. In enacting RICO, Congress sought to punish only "large-scale" usury operations, as contrasted with small-time "loan sharking." Proof of *one* usurious loan can

hardly be said to meet that criterion. Indeed, to allow a conviction to stand when the prosecution proves only *one* usurious loan simply reads out of the statute the "conjunctive requirement" that the debt be incurred in connection with the "business" of lending money at the statutorily specified usurious rates.[3]

Proof of a single usurious loan is simply insufficient to establish a business of lending money. As the defendant maintains that the proof at trial established at worst that he was involved with only one usurious loan, his RICO convictions (Counts 1 and 2) should have been reversed and remanded for a new trial.[4]

The petition should also be granted to resolve a conflict among the Circuit Courts of Appeals concerning whether § 4205(b) authorizes a district court to increase the parole eligibility date beyond the ten-year limit established by § 4205(a).[5]

In an exhaustive and scholarly opinion, Judge Coffin, writing for a unanimous panel of the First Circuit Court of Appeals, recently concluded that § 4205(b)(1) does not confer upon judges the power to extend the

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[3] That RICO was aimed at large-scale, repetitive criminal operations is, of course, fully supported by the legislative history. *See, e.g.*, 116 Cong. Rec. 35193, 35196, 35208 (1970); *H.R.Rep.No. 91-1549*, 91st Cong. 2d Sess. at 35, 56, 186; *S. Rep. No. 612*, 91st Cong. 1st Sess. at 124, 158 (1969); *see* also, the legislative analysis of Title IX of the Organized Crime Control Act of 1970 (creating RICO), U.S. Code Cong. & Admin. News, 91st Cong. 2d Sess. 4007 at 4010 (1970).

[4] As the Court of Appeals did not write an opinion, it is impossible to determine if they affirmed the conviction based upon construction of §§ 1961 and 1962 or upon a finding that the proof at trial was sufficient regardless of the statutory construction.

[5] While the Sentencing Reform Act, Pub.L. No. 98-473, § 235, 98 Stat. 1834 (effective Nov. 1, 1987), may ultimately render this issue moot, it is currently a viable issue affecting many convicted defendants, as well as those indicted or to be indicted for offenses committed prior to November 1, 1987.

parole eligibility date beyond the ten-year limit of § 4205(a). *United States v. Castonguay,* 843 F.2d 51 (1st Cir. 1988).

Judge Coffin began the analysis by noting that in the 1970's several courts assumed in passing that § 4205(b)(1) only authorized early parole. *Id.* at 52-53. *United States v. Busic,* 592 F.2d 13, 26 (2d Cir. 1978); *United States v. Price,* 474 F.2d 1223, 1228 (9th Cir. 1973); *Jones v. United States,* 419 F.2d 593, 595 (8th Cir. 1969). Subsequently, by split decisions, the Eighth and Ninth Circuits held that the plain language of §4205(b)(1) permitted the sentencing court to exceed the parole eligibility limit of § 4205(a). *United States v. Gwaltney,* 790 F.2d 1378, 1388-89 (9th Cir. 1986); *Rothbeg v. United States,* 789 F.2d 647, 652 (8th Cir. 1986), and the Tenth and Eleventh Circuits concurred. *See, United States v. Berry,* 839 F.2d 1487 (11th Cir. 1988); *United States v. O'Driscoll,* 761 F.2d 589 (10th Cir. 1985).

However, after an exhaustive analysis of the legislative history, the Seventh Circuit concluded that § 4205(b)(1) does not authorize such an extension of parole eligibility. *United States v. Fountain,* 840 F.2d 509 (7th Cir. 1988).

In *Castonguay*, as in *Fountain,* after an exhaustive analysis of the legislative history, the court concluded that the legislation was viewed by those involved in the legislative process as a measure intended to authorize the early release of prisoners. 843 F.2d at 55.

The legislation was also intended to reduce disparities in sentencing and to promote joint sharing of responsibility in sentencing between judges and the parole board. Each of these objectives is furthered by interpreting § 4205(b)(1) as authorizing judges to set early release dates and each of these objectives is deterred by interpreting § 4205(b)(1) as authorizing judges to set parole eligibility dates beyond the ten-year limit established by § 4205(a). *Id.* at 55-56.

It is thus clear that had the petitioner been sentenced in the First or Seventh Circuits, and most likely in the Second Circuit as well, his sentence would have been vacated to the extent it exceeded the ten-year parole eligibility requirement of § 4205(a). The Eleventh Circuit Court of Appeals in the instant case adhered to its holding in *Berry* (see Appendix B) and refused to set aside the sentence of the petitioner, despite the provision that petitioner is not eligible for parole for a period of 13 years.

Because this case presents fundamental issues affecting the administration of justice and one of those issues has divided the Circuit Courts of Appeals, certiorari should be granted.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: New York, New York
August, 1988

Respectfully submitted,

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APPENDICES

Appendix A
Opinion of United States Court of Appeals

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 87-5331

D.C. Docket No. 83-8044

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ANTHONY RUGGIANO,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(March 17, 1988)

Before FAY and CLARK, Circuit Judges, and Guin,* District Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

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*Honorable J. Foy Guin, Jr., U.S. District Judge for the Northern District of Alabama, sitting by designation.

Judgment Entered: March 17, 1988
For the Court: Miguel J. Cortez, Clerk

By: /s/_____
Deputy Clerk

ISSUED AS MANDATE: JUL 14 1988

Appendix B
Order of United States Court of Appeals
On Petition for Rehearing

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 87-5331

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ANTHONY RUGGIANO,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING

(June 30, 1988)

BEFORE: FAY and CLARK, Circuit Judges, and GUIN,* District Judge.

PER CURIAM:

The Petition(s) for rehearing filed by appellant, Anthony Ruggiano, is denied. *See United States v. Berry*, 839 F.2d 1487 (11th Cir. 1988).

ENTERED FOR THE COURT:

/s/ _____
United States Circuit Judge

* Honorable J. Foy Guin, Jr., U.S. District Judge for the Northern District of Alabama, sitting by designation.

Supreme Court, U.S.
FILED
OCT 28 1988
JOSEPH F. SPANIOL, JR.

No. 88-367

In the Supreme Court of the United States

OCTOBER TERM, 1988

ANTHONY RUGGIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's convictions for violating the RICO statute.

2. Whether former 18 U.S.C. (1982 ed.) 4205(b)(1) (repealed as of November 1, 1987) gave the district court authority to direct that petitioner serve 13 years of his 40-year sentence before becoming eligible for parole.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-367

ANTHONY RUGGIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals affirming petitioner's conviction (Pet. App. 1a) and the order entered on petitioner's petition for rehearing (Pet. App. 2a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1988. A petition for rehearing was denied on June 30, 1988. The petition for a writ of certiorari was filed on Monday, August 29, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of racketeering, in violation of 18 U.S.C. 1962(c) (Racketeer Influenced and Corrupt Organizations (RICO)); conspiring to engage in racketeering, in violation of 18 U.S.C. 1962(d) (RICO conspiracy); and making an extortionate extension of credit, in violation of 18 U.S.C. 892(a). He was sentenced to consecutive 20-year terms of imprisonment on the RICO counts and to a concurrent 20-year term on the extortionate credit count. The court specified that petitioner was to become eligible for parole following the service of 13 years' imprisonment.

The evidence at trial showed that in 1981 petitioner told Joseph Iannuzzi that he planned to establish a gambling club in Palm Beach County, Florida, and that he wanted Iannuzzi to operate a bar on the premises and act as a front man (104 R. 175). Petitioner directed Iannuzzi to arrange for police chief William Darden, whom petitioner knew was corrupt, to provide protection for the club, and Iannuzzi did so (104 R. 175-195). Iannuzzi, who had previously agreed to cooperate with the FBI after a friend of petitioner brutally beat him for failing to make interest payments on a loan (104 R. 108-112), subsequently introduced undercover FBI agent John Bonino to petitioner, explaining that Bonino would serve as Iannuzzi's partner in the operation of the bar (105 R. 261). Iannuzzi and Bonino told petitioner that they had located a suitable suite of rooms for the bar and gambling club and showed it to him; petitioner told them where the blackjack tables should be located and said that he would have his own dealers come down from New York when the club opened (105 R. 264; 110 R. 912-915). Over dinner, petitioner told Iannuzzi and Bonino that he was a captain in the Gambino organized crime family (110 R. 925-926).

Iannuzzi and Bonino later told petitioner that they needed $25,000 to finish the construction of the bar. Petitioner said that he would lend them the money at two "points" per week, or 104% per year (105 R. 307). Iannuzzi and Bonino were subsequently given $10,000 in cash at petitioner's house (105 R. 333). Petitioner directed Salvatore Reale, who was at petitioner's house at the time, to bring the other $15,000 from New York and give it to Iannuzzi and Bonino, which he did (105 R. 349-359). Reale advised Iannuzzi and Bonino to maintain a good relationship with him, since they might need another loan, and he told them that they had been given the loan on good terms, since five points per week was their regular rate (110 R. 993-994). After Iannuzzi and Bonino had made some payments on the loan (105 R. 373; 106 R. 435; 107 R. 507), the FBI closed its undercover operation.

The court of appeals affirmed without opinion (Pet. App. 1a). In denying a petition for rehearing, the court cited (*id.* at 2a) its earlier decision in *United States* v. *Berry*, 839 F.2d 1487 (11th Cir. 1988), petition for cert. pending, No. 87-7205, in response to petitioner's claim that his 13-year minimum sentence was unlawful.

ARGUMENT

1. Petitioner contends (Pet. 6-9) that the evidence was insufficient to sustain his conviction on the RICO counts. The statute prohibits conducting an enterprise's affairs "through a pattern of racketeering activity or collection of unlawful debt" (18 U.S.C. 1962(c)), and petitioner was charged under both prongs. Petitioner does not claim that the evidence was insufficient to support his conviction under the "pattern of racketeering activity" prong. Indeed, the evidence was more than sufficient to support a conviction for engaging in a pattern of racketeering activity, as

the government proved that he bribed a police officer, made an extortionate extension of credit, and conspired to operate a gambling facility, which were the predicate acts charged.

Petitioner contends only that the jury might have convicted him under the "collection of unlawful debt" prong, and he argues that the evidence was insufficient in that respect. The statute defines "unlawful debt," in pertinent part, as a debt incurred in connection with "the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate" (18 U.S.C. 1961(6)). It is undisputed that petitioner's 104% loan was an "unlawful debt" under Section 1961(6), since an interest rate exceeding 18% is usurious under Fla. Stat. Ann. § 687.071 (West 1966 & Supp. 1988). However, petitioner contends that the government did not prove that he was involved in "the 'business' of lending money," since the evidence revealed only a single usurious loan (Pet. 8-9).

There is no merit to petitioner's contention. While the RICO statute provides that "at least two acts of racketeering activity" must be proved to support a conviction under the "pattern of racketeering activity" prong (18 U.S.C. 1961(5)), it does not require that more than one usurious loan be proved to support a conviction under the "collection of unlawful debt" prong. See *United States* v. *Pepe*, 747 F.2d 632, 661 (11th Cir. 1984). The jury instructions, to which petitioner did not object, correctly stated that Section 1961(6) requires that the government prove that "the debt was incurred in connection with the business of lending money at a rate usurious under State law" (115 R. 1660). The jury reasonably could have concluded that petitioner made the usurious loan to Iannuzzi and Bonino in connection with such a business. Most obviously, petitioner directed Reale to deliver the remainder of the loan

to Iannuzzi and Bonino, and, when he did so, Reale told them they were getting a favorable rate and suggested that they might later need another loan (105 R. 349-359; 110 R. 993-994). That statement indicates that petitioner and Reale were engaged in making usurious loans as a regular business activity. The evidence at trial therefore satisfied each of the elements of the racketeering offense, both on the "pattern of racketeering activity" prong and the "collection of unlawful debt" prong charged in the indictment. Thus, whether the jury based its verdict on the first prong, the second prong, or both, the evidence was sufficient to support petitioner's conviction.

2. Petitioner also contends (Pet. 9-11) that the district court lacked the authority to provide that he would be ineligible for parole for 13 years. Three courts of appeals have held, contrary to the court below, that judges sentencing under the pre-1987 federal sentencing scheme could not mandate a minimum sentence longer than ten years. *United States* v. *DiPasquale*, No. 87-1513 (3d Cir. Oct. 7, 1988); *United States* v. *Castonguay*, 843 F.2d 51 (1st Cir. 1988); and *United States* v. *Fountain*, 840 F.2d 509 (7th Cir. 1988). Those courts have relied on 18 U.S.C. (1982 ed.) 4205(a) (repealed), which provided that federal prisoners were generally eligible for parole "after serving one-third of [a term of years] or after serving ten years of a life sentence or of a sentence of over thirty years." Three other courts of appeals have agreed with the court below that under that sentencing scheme a minimum sentence of up to one-third of the maximum sentence was permitted. *United States* v. *Gwaltney*, 790 F.2d 1378 (9th Cir. 1986), cert. denied, 479 U.S. 1104 (1987); *Rothgeb* v. *United States*, 789 F.2d 647 (8th Cir. 1986); and *United States* v. *O'Driscoll*, 761 F.2d 589 (10th Cir. 1985), cert. denied, 475

U.S. 1020 (1986). Those courts have noted that Section 4205(a) applied "except to the extent otherwise provided by law," and have relied upon 18 U.S.C. (1982 ed.) 4205(b)(1) (repealed), which provided that a sentencing judge could designate "a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court." Despite the conflict in the circuits, this issue does not warrant this Court's review because the issue is of no continuing importance since Section 4205 was repealed effective November 1, 1987, by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 218(a)(5), 235, 98 Stat. 2027, 2031, as amended by the Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728.

If the Court should strike down the sentencing guidelines established by the Sentencing Reform Act in *United States* v. *Mistretta,* No. 87-1904 (argued Oct. 5, 1988), it may also conclude that other provisions of the Act are not severable, including the provisions repealing Section 4205. Even in that event, however, this case would not warrant review. Since he received a 40-year sentence, petitioner is ineligible for parole for at least ten years. Because of his criminal record and his leadership role in organized crime,* we think it very unlikely that the Parole Commission would decide to grant him parole after only ten years. In light of the low probability that the 13-year minimum sentence will have any effect on petitioner, review by this Court is not warranted.

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* The sentencing memorandum filed by the United States Attorney noted that petitioner was convicted in 1946 by a court-martial for being AWOL in time of war and was sentenced to five years' imprisonment. Shortly after his release, petitioner was convicted of attempted burglary. Petitioner subsequently became involved with organized crime. In 1970, he served 30 days in jail on a civil contempt charge

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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OCTOBER 1988

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rather than testifying before a grand jury investigating bookmaking, narcotics, and infiltration of labor unions by organized crime in the New York area. In 1977, he was convicted of criminal contempt and sentenced to one year in jail after refusing to testify before another grand jury investigating organized crime's attempts to acquire police protection for illegal gambling operations in the New York area. In 1983, he was convicted of contempt of court and sentenced to one year in jail for evading subpoenas issued by a grand jury investigating loansharking. Petitioner had been indicted on that charge in New York in 1980 but had fled to Florida, where he became involved in the activities leading to his conviction in this case. The sentencing memorandum also noted that tape recordings made by Iannuzzi documented that petitioner bragged about his participation in organized crime and documented that petitioner had operated a gambling club in New York in the 1970s.

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No. 88-367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ANTHONY RUGGIANO,

Petitioner.

VS.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

1. The respondent argues that a writ of certiorari should be denied because the proof at trial was sufficient to establish that petitioner extended credit in connection with "the business of lending money" within the meaning of 18 U.S.C. §1961(6). The respondent argues that proof of this element was provided by the out-of-court declarations of Reale in the course of delivering funds to Iannuzzi and Bonino. Thus, respondent avers that, ". . . . Reale told them they were getting a favorable rate and suggested that they might later need another loan (105 R. 349-59;

110 R. 993-94). That statement indicates that petitioner and Reale were engaged in making usurious loans as a regular business activity" (Brief in Opp. at 5). Reliance on Reale's statement is inappropriate because the district court limited admission of that statement to show Bonino's state of mind (110 R. 993). It may not, therefore, be relied upon for the truth of the matter asserted as respondent attempts to do. Thus, respondent has not demonstrated adequate proof of "the business of lending money. . . .at a usurious rate."

2. With respect to petitioner's position that 18 U.S.C. §4205(a) does not authorize a trial court's increase of the parole eligibility date beyond ten years, respondent acknowledges an even split of authority among the circuit courts of appeals but argues that a writ of certiorari should be denied because §4205 was repealed by the Sentencing Reform Act of 1984, Pub.L. No. 98-473, §218(a)(5), 235, 98 Stat. 2027, 2031, as amended by the Sentencing Reform Amendments Act of 1985, Pub.L. No. 99-217, §4, 99 Stat. 1728. Respondent reasons that the repeal of 4205 renders the issue "of no continuing importance" (Brief in Opp. at 6). However, government projections indicate that over the next four years 33,000 cases subject to sentencing pursuant to §4205, will be prosecuted in federal courts.[1] If there are an average of three defendants per case, almost 100,000 defendants will be sentenced pursuant to §4205 even if the sentencing guidelines and the repeal of §4205 are not disturbed by this Court. Therefore, the issue is of continuing importance and should be considered by the Court.

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[1] The United States Sentencing Commission from unpublished projections has provided the following figures to petitioner:

Fiscal Year Ending	Projection of New Non-guideline Cases in System
9/30/89	17,000
9/30/90	9,000
9/30/91	5,000
9/30/92	2,000
TOTAL	33,000

Respondent also argues that even if the Court, in *United States v. Mistretta*, no. 87-1904 (argued October 5, 1988), strikes down the sentencing guidelines established by the Sentencing Reform Act and the repeal of §4205 is also struck down, nevertheless, this case should not be reviewed because in the respondent's opinion, petitioner would likely not be granted parole after he has served ten years in prison. Certainly whether a writ of certiorari will or will not be granted, should not turn upon the speculation of either party concerning events and judgments to be made many years in the future.[2] Moreover, whether or not the parole commission grants petitioner parole prior to serving 13 years in prison, petitioner has a right to be afforded the opportunity for release prior to expiration of the 13-year minimum. Review by this Court is warranted to safeguard respondent's right to be afforded the opportunity for parole after 10 years as specified by §4205.

Review is warranted to safeguard Mr. Ruggiano's rights as well as those of all other defendants who stand indicted for crimes committed prior to November 1, 1987.[3] Further, should the Court strike down the repeal of §4205, then a determination of this issue would potentially affect every pending criminal prosecution and review would be even more appropriate in order to resolve the conflict among the Circuit's insuring uniformity in the imposition of sentences throughout the federal judicial system.

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[2] Respondent does not cite parole commission guidelines or any other authority to support its belief that petitioner would likely not be paroled. In fact, those guidelines, petitioner's age, and cancerous condition suggest he would be paroled.

[3] Considering applicable statutes of limitations, indictments can be found for offenses committed prior to November 1, 1987, well into 1992, and in some cases, beyond (*see, e.g.*, 26 U.S.C. § 6531, prescribing a six-year statute of limitations for some tax offenses).

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York, New York
November, 1988

Respectfully submitted,

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